INDEX

Statement 1
Points and Authorities 12
Argument 15
Conclusion 43

CITATIONS.

Ark. So. R. Co. vs. German Nat. Bank, 207 U. S. 270 13
Atl. Coast Line R. Co. vs. Glenn, 239 U. S. 388 13
Atchison R. Co. vs. Matthews, 174 U. S. 96 13
Brush Elec. Co. vs. City, 262 U. S. 1076 33
California Powder Works vs. Davis, 151 U. S. 389 . . 12, 21
Capital Nat. Bank vs. First Nat. Bank, 172 U. S. 425 13
Carpenter vs. Williams, 19 U. S. 827 13
Cedar Rapids G. L. Co. vs. City, 223 U. S. 653 33
City Louisville vs. Cumberland T. & T. Co., 225 U. S. 431 34
C. M. & St. P. R. R. Co. vs. Hackett, 228 U. S. l. c. 562 31
Cristman vs. Miller, 107 U. S. 313 13
26 Corpus Juris 17 . . . . . 14, 28
Davidson vs. New Orleans, 96 U. S. 97 12
Des Moines Nat. Bank vs. Fairweather, 263 U. S. 103 . . . . . 12, 16
De Saussure vs. Gaillard, 127 U. S. 216 13
Dibble vs. Land Co., 163 U. S. 63 13
Eustis vs. Bolles, 150 U. S. 361 . . . . . 13, 22
First Nat. Bank vs. Ayres, 160 U. S. 660 12
Fischer vs. St. Louis, 194 U. S. 361 12

Galveston Elec. Co. vs. City of Galveston, 258 U. S. 388 . . . . . 14, 27
Galveston Elec. Co. vs. Galveston, 258 U. S. 388 34
Giles vs. Teasley, 193 U. S. 146 13
Harris vs. Dennie, 7 U. S. 683 13
Hibben vs. Smith, 191 U. S. 310 . . . . . 12, 19
Howard vs. Kentucky, 220 U. S. 164 31
In re Buchanan, 158 U. S. 31 13
Kenney vs. Craven, 215 U. S. 125 12
King vs. West Virginia, 216 U. S. 92 . . . . . 13, 26
Klinger vs. Mo., 20 U. S. 635 13
Klinger vs. Mo., 13 Wall. 257, 263 22
K. of P. vs. Meyer, 265 U. S. l. c. 32, 35 . . . . . 12, 16
Ky. R. Tax Cases, 115 U. S. 321 12
Lent vs. Tillson, 140 U. S. 316 19
L. & N. R. Co. vs. Ry. Com. of Tenn., 19 Fed. 694 . . 32
Martin vs. Marks, 97 U. S. 345 13
Merchants Mutual A. L. Ins. Co. vs. Smart, 267 U. S. l. c. 130 . . . . . 14, 30
Mining Company vs. Goodman, 17 U. S. 257 12
M. K. & T. R. Co. vs. Haber, 169 U. S. 613 13
M. K. & T. Ry. Co. vs. Haber, 169 U. S. 613 12
Mobile R. Co. vs. Miss., 210 U. S. 187 13
New Orleans vs. Waterworks Co., 142 U. S. 79 . . . . . 13, 23
N. W. Nat'l Life Ins. Co. vs. Riggs, 203 U. S. 243 . . 14, 29
Patterson vs. Colo., 205 U. S. 454 12
Paul vs. Virginia, 75 U. S. l. c. 183 . . . . . 14, 28
People vs. Atwell, 261 U. S. 590 12
Quimby vs. Boyd, 128 U. S. 488 13
Railroad vs. New Haven, 203 U. S. 379 12
R. S. Mo. 1819, Sec. 6280 15

R. S. Mo. 1819, Sec. 6281 15
Smith vs. Ind., 191 U. S. 138 12
Smith vs. Jennings, 206 U. S. 276 12
Smiley vs. Kansas, 196 U. S. 447 .....13, 26
Southern R. Co. vs. Durham, 266 U. S. 178 12
Southern Pac. Co. vs. Schuyler, 227 U. S. 601 13
Supreme Lodge vs. Meyer, 265 U. S. l. c. 30 12
The Winnebago, 205 U. S. 354 12
Turnpike Co. vs. Norfolk R. Co., 228 U. S. 596 13
Verea College vs. Ky., 211 U. S. 45 13
Waters-Pierce Oil Co. vs. Texas, 212 U. S. 112 13
Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86 ....13, 25

No. 601.

In the Supreme Court of the United States

OCTOBER TERM, 1926.

AETNA INSURANCE COMPANY, AGRICULTURAL INSURANCE COMPANY, ALLIANCE INSURANCE COMPANY OF PHILADELPHIA, ET AL., PETITIONERS,

VS.

BEN C. HYDE, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

STATEMENT.

The statement of petitioners in this case is so unfair and inaccurate that respondent is compelled to make a brief statement of the issues in this case.

On the 9th day of October, 1922, the insurance department of Missouri ordered a reduction in fire insurance rates of 10 per cent in accordance with Section 6283, Revised Statutes of Missouri, 1919.

Prior to 1915 fire insurance companies in Missouri were under the provisions of the anti-trust laws, so the

Legislature that year passed the Missouri Rating Act, which was prepared by the insurance companies and the State of Missouri (R. 2300-2305).

During the trial the insurance companies contended that the proper method to figure profit or loss for fire insurance companies was on the basis of premiums earned, losses and expenses incurred, as distinguished from premiums received, losses and expenses paid. The state contended that the proper way to figure profit or loss was by using the well-known method of premiums received, losses and expenses paid. It was purely a question of fact as to which of these two methods should be adopted, and in addition thereto involved the construction of the Missouri Rating Act, Sections 6280, 6281, 6282 and 6283, Revised Statutes of Missouri, 1919.

Section 6280, Revised Statutes of Missouri, 1919, requires the insurance companies to file with the insurance department a report showing "the net amount of insurance in force and written, net premiums received and net losses paid."

Section 6281, Revised Statutes of Missouri, 1919, requires all fire insurance companies doing business in Missouri to report to the insurance department "the total amount of their premiums, losses and expenses," and "the total amount of its earnings on unearned premiums."

The state naturally contended that when the Legislature required these insurance companies to report their business on the basis of premiums received, losses and expenses paid, such a method should be used for rate-making purposes. The Legislature nowhere used the

words "earned premiums," because such a method was not to be used for rate-making purposes. The testimony shows without contradiction that all of the reports used by these companies in reporting their business to Missouri were on the basis of premiums received, losses paid and expenses paid (R. 2748). Also that the insurance department has never been in possession of sufficient facts to allow it to figure the experience of these companies on any other basis (R. 2746-2750).

During the trial four presidents of the largest fire insurance companies in America testified that the state's method of figuring profit and loss on the basis of premiums received, losses and expenses paid was proper and that the method contended for by the insurance companies of premiums earned, losses and expenses incurred was improper (R. 408-722-1146-1190-1192-1211-1293).

In 1915 these insurance companies applied to the state for an increase in rates and received same using the method now contended for by the state and repudiated by them of premiums received, losses and expenses paid (R. 2834 to 2839).

In 1919 these same insurance companies filed a suit in the Circuit Court of Cole County, Missouri, called the "Surcharge Case," asking again for an increase and using the method of premiums received, losses and expense paid, as contended for by the state (R. 2744 Defs. Ex. 2035 at R. 2310).

In January, 1920, these insurance companies again applied to the state and received an increase of 15 per cent, using the method of premiums received, losses and

expenses paid, as now contended for by the state (R. 2744).

When this question came before the Supreme Court of Missouri the evidence was absolutely overwhelming that the state's method of figuring was right and that the insurance companies' method was wrong. In fact the decision could not have been otherwise. We invite a careful reading of the decision in this case because no other result could have been reached.

During the trial the companies offered evidence showing that they received in Missouri during the five-year test period $83,502,181.00 in premiums and that their losses and expenses paid were $80,161,057.00, leaving them a profit on this business alone of $3,341,124.00. They had previously filed sworn reports with Missouri, stating that they had received premiums in the sum of $77,897,768.00 and paid losses and expenses in Missouri in the sum of $72,592,893.00, leaving them a profit on this business alone of $5,304,875.00.

The figures in this law suit show a smaller profit than reported to the state by such sworn reports. The insurance companies attempted to explain same by saying the blanks furnished by the state were not properly understood by them and frankly state they could not justify the reports submitted to the state because such were inaccurate, unfair, contained many duplications and were indefensible (R. 522-533-534-535). And yet the record shows that the actuaries and experts were the most skillful in America and the reports could have been properly filled out had the companies so desired.

In fact the record convicts the companies of having made improper and false reports to the State of Missouri for the sole purpose of influencing the state in regulating fire insurance rates.

Notwithstanding the reports of these companies that they had a profit of $5,304,875.00 during this period and notwithstanding the evidence in this case that their profit was $3,341,124.00, these companies boldly contended that they actually lost in Missouri during this period $7,010,200.00 and that had the reduction of 10 per cent been in effect during these years they would have lost the additional sum of $7,134,751.00, or a total loss of $14,144,951.00.

Obviously such a claim could only have been made by adopting and using some theory of economics unknown to the business world. They admit they took in $5,000,000.-00 more than they paid out and yet they say they lost $7,000,000.00. The Supreme Court of Missouri refused to adopt any such unfair method of bookkeeping and the opinion is so clear on this point that we do not intend to impose further upon the time of this court in showing the absurdity of their contention. Such a method was devised by them for the first time in Missouri for the sole purpose of imposing upon the state in this law suit. They had never before attempted to use it in Missouri, but had secured the last two increases on the state's method, and the court naturally found that if was unfair for them to repudiate the method which they had always used with the state and on which they had secured two increases.

The earned premium theory of figuring profit and loss for rate-making purposes is fundamentally erroneous (R. 495-496-497). The companies contended that the earned premium basis was proper as showing the solvency of these companies. Solvency is one thing and rate-making is another and the distinction is carefully pointed out in the opinion of the Supreme Court of Missouri. In this particular case five years was the test period. There was no question of solvency involved. A company may be perfectly solvent and yet have on hand millions of dollars which it is holding for the happening of some contingency, and of course it should be charged with all the money which it has on hand.

The companies also claim that Section 6222, Revised Statutes of Missouri, 1919, require them to maintain "an unearned premium reserve fund," and that this fund is not available for distribution as profits in the form of dividends or otherwise." Such section does not so hold and such interpretation is erroneous. That part of the section so construed in charging the companies with certain liabilities and requiring them to maintain a reserve for the sole purpose of re-insurance, says:

> "Fifth: Premium reserved or amount required to safely re-insure all outstanding risks to be estimated by taking fifty per cent of the gross premiums on all unexpired fire risks that have less than one year to run and a *pro rata* of all gross premiums on risks that have more than one year to run."

This section nowhere uses the words "unearned premium reserve fund" and has nothing to do with rate-

making, but simply requires fire insurance companies to set up a sufficient fund to safely re-insure their risks in case they become insolvent, go out of business or desire to sell their business. The Missouri Rating Act is a complete act within itself and this section is not a part thereof and has nothing to do with rate-making. This reserve can be carried just as well by using the method of premiums received as by using the method of premiums earned, and is not reached by the method used by the companies in calculating "earned premiums."

The companies refer in their brief to two decisions upholding the method of calculating profit or loss as urged by them, namely, earned premiums and expenses and losses incurred. That is the Sun case at London and the Bullion case of Arkansas. With reference to the latter, there was a three to two opinion, the presiding justice, Judge McCullough, writing a very strong dissent to the adoption of the earned premium method of calculation. Moreover, this opinion was based, from the reading of the opinion itself, upon an entirely different statement of facts than in the instant case, none of the vices which are pointed out in the opinion of the Missouri Supreme Court apparently having been either urged or passed upon by the Supreme Court of Arkansas.

With reference to the Sun Insurance Company case of London, this was not a rate case at all, but a tax case, presenting an entirely different situation from the instant case. In the latter a definite five year period for investigation is involved. Within this sharply defined period all of the matters must be found upon which to base an insurance rate. Those matters which are by

methods of calculation excluded from the period are forever excluded for the purpose of making a particular rate. In the Sun Insurance Company case it was purely a question of taxation and whether any particular part of the income would be reached this year or next year or some other period, it all ultimately washed out, because ultimately all of the income would be taxed. The same considerations moved Congress in adopting a method as referred to by the brief of the insurance companies for calculation. In tax matters ultimately all the income affected will be reached and taxed. This would not be true if that law applied to but a single year, and part of the taxable income, by some method of calculation, would be excluded from consideration. That is what happens in the matter of rate making in the method of calculation urged by the insurance companies, namely, by the fact that an investigation must be made over a definite five year period for the purpose of making a rate. When part of the income for that period is excluded, it will never be considered in making that rate. With reference to incurred losses, they are paid out of current revenue, no matter when the actual payment takes place. The method of calculating both earned premiums and incurred losses and using them as the basis of calculation is condemned in unmeasured terms by a unanimous opinion of the Supreme Court of Missouri. The confines of this brief are too limited to permit of an extended discussion of the vices of that method of calculation. Therefore, we respectfully submit to the court the able statements concerning same contained both in the majority and the minority opinions as cited in the brief for the insurance companies.

With reference to incurred expenses, it is a curious fact that the companies, on page 13 of their brief, state that the difference between expenses incurred and expenses paid is negligible, because expenses are paid substantially as soon as incurred. If that is true, and the record of this case sustained it throughout (R. 708-765), then the question of paid or incurred expenses is out of this case. On page 45 of the insurance companies' brief they say that the agency commissions amount to between twenty-two and twenty-five percent and usually only the agent's commission is paid in the year in which the business is written. Counsel for the State of Missouri respectfully call this court's attention to these diametrically opposed statements for the purpose of shedding light on some of the things that have transpired in this case.

The sum of $2,496,715.00 excess commissions paid to brokers and agents in St. Louis was not allowed by the Supreme Court of Missouri and the same should not have been allowed as the opinion clearly shows. These companies paid an average commission throughout the State and an excess commission in St. Louis to brokers, and it was unfair to pass this on to the policyholders of Missouri. The evidence is all one way on this question.

The Supreme Court of Missouri refused to allow the sum of $628,123.00 federal tax on Missouri premiums because such law had been repealed at the time the reduction order was made and the companies would not in the future have to pay same. This reduction order was to apply to the future and not the past and as these companies will not have to pay this tax in the future they should not be allowed to charge it against the policy-

holders of Missouri or a future rate The Supreme Court of Missouri held that 8 per cent on volume of business was a reasonable profit and this was taking everything into consideration after all reserves had been set up and was certainly more than usually allowed in such cases. However, the companies made more than 12 per cent, as we will show later, so they cannot complain.

The evidence in this case overwhelmingly shows that these companies earned an enormous profit in Missouri and this 10 per cent reduction which they complain about is not a reduction at all, but really a 5 per cent increase, for the reason that in 1920 these companies were granted an increase in rates of 15 per cent, and in 1922 this reduction of 10 per cent was ordered so that in the future the companies will still have a 5 per cent increase over the rate in effect during the period from 1917 to 1921 inclusive after the 10 per cent reduction is in effect.

Counsel respectfully prays to call the court's attention to the fact that the dissenting opinion cited by the insurance companies in their brief passes upon a matter in dissent which was decided against the State of Missouri in the majority opinion, namely, the right to figure earnings on capital and surplus in arriving at a rate. The majority opinion determined this issue against the State of Missouri, so that there was nothing to dissent from in that matter in the dissenting opinion. As a matter of fact, outside of that point, the dissenting opinion passed upon but two matters, namely, the right to calculate interest earnings upon the unearned premiums and the right to calculate the 15 per cent increase granted the companies in January, 1920. The latter mat-

ter was decided in favor of the State and is not raised in the present brief of the insurance companies before this Honorable Court, so that the dissent covers but a single point, namely, the right of the State to figure earnings upon the unearned premium reserves in arriving at a rate. In connection with this matter the state respectfully calls the court's attention to the requirements of Sections 6281 and 6282 of the Revised Statutes of Missouri for 1919, which requires the insurance companies to report their earnings on unearned premiums to the State of Missouri, the apparent purpose of the Legislature being to consider those matters in arriving at rates, as these requirements are part of the Rating Act itself.

POINTS AND AUTHORITIES.

I.

The method of figuring the profit and loss of fire insurance companies and whether or not interest shall be allowed on unearned premiums is regulated by the Missouri statute and this court will follow the construction placed upon such statute by the supreme court of the state.

K. of P. v. *Meyer*, 265 U. S. l. c. 32, 35.
Hibben v. *Smith*, 191 U. S. 310.
Smith v. *Ind.*, 191 U. S. 138.
The Winnebago, 205 U. S. 354.
Patterson v. *Colo.*, 205 U. S. 454.
Smith v. *Jennings*, 206 U. S. 276.
Kenney v. *Craven*, 215 U. S. 125.
Railroad v. *New Haven*, 203 U. S. 379.
Fischer v. *St. Louis*, 194 U. S. 361.
Mining Company v. *Goodman*, 17 U. S. 257.
Davidson v. *New Orleans*, 96 U. S. 97.
Ky. R. Tax Cases, 115 U. S. 321.
M. K. & T. Ry. Co. v. *Haber*, 169 U. S. 613.
Southern R. Co. v. *Durham*, 266 U. S. 178.
Supreme Lodge v. *Meyer*, 265 U. S. l. c. 30.
Des Moines Nat. Bank v. *Fairweather*, 263 U. S. 103.
First Nat. Bank v. *Ayres*, 160 U. S. 660.

II.

No federal question is involved in this case. The decision rests on independent grounds not involving the federal question and the petition for certiorari should be denied.

People v. *Atwell*, 261 U. S. 380.
California Powder Works v. *Davis*, 151 U. S. 389.

Harris v. *Dennie*, 7 U. S. 683.
New Orleans v. *Waterworks Co.*, 142 U. S. 79.
Eustis v. *Bolles*, 150 U. S. 361.
Dibble v. *Land Co.*, 163 U. S. 63.
Capital Nat. Bank v. *First Nat. Bank*, 172 U. S. 425.
Berea College v. *Ky.*, 211 U. S. 45.
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 112.
Southern Pac. Co. v. *Schuyler*, 227 U. S. 601.
Atl. Coast Line R. Co. v. *Glenn*, 239 U. S. 388.
Turnpike Co. v. *Norfolk R. Co.*, 228 U. S. 596.
Klinger v. *Mo.*, 20 U. S. 635.
De Saussure v. *Gaillard*, 127 U. S. 216.
Mobile R. Co. v. *Miss.*, 210 U. S. 187.
Ark. So. R. Co. v. *German Nat. Bank*, 207 U. S. 270.
Giles v. *Teasley*, 193 U. S. 146.

III.

All questions involved in this case are questions of fact. This court has no jurisdiction to review the decision of the Supreme Court of Missouri on questions of fact.

King v. *West Virginia*, 216 U. S. 92.
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86.
Smiley v. *Kansas*, 196 U. S. 447.
Atchison R. Co. v. *Matthews*, 174 U. S. 96.
In re Buchanan, 158 U. S. 31.
Quimby v. *Boyd*, 128 U. S. 488.
Martin v. *Marks*, 97 U. S. 345.
Carpenter v. *Williams*, 19 U. S. 827.
Cristman v. *Miller*, 107 U. S. 313.
M. K. & T. R. Co. v. *Haber*, 169 U. S. 613.

IV.

These fire insurance companies have no property in Missouri and the Fourteenth Amendment to the Federal Constitution affords them no protection.

26 Corpus Juris 17.

Paul v. *Virginia*, 75 U. S. l. c. 183.

Northwestern National Life Ins. Co. v. *Riggs*, 203 U. S. 243.

Merchants Mutual Automobile Liability Ins. Co. v. *Smart*, 267 U. S. l. c. 130.

Good will cannot be considered in determining if a rate is confiscatory.

Galveston Electric Co. v. *City of Galveston*, 258 U. S. 388.

V.

The Missouri decision is so clear and convincing on all points decided that we are unable to add anything to it.

ARGUMENT.

I.

The method of figuring the profit and loss of fire insurance companies and whether or not interest shall be allowed on unearned premiums is regulated by the Missouri statute and this court will follow the construction placed upon such statute by the supreme court of the state.

The Missouri Rating Act is a complete act within itself and Section 6280, Revised Statutes of Missouri, 1919, which petitioners left out of their appendix, requires all fire insurance companies to file with the insurance department a report showing "the net amount of insurance in force and written, net premiums received, and net losses paid." Section 6281, Revised Statutes of Missouri, 1919 requires all fire insurance companies doing business in Missouri to report to the insurance department "the total amount of their premiums, losses and expenses."

If the Legislature had meant that premiums earned, losses and expenses incurred should be used for rate-making purposes, it would have said so. Why did the Legislature say "premiums received" if it wanted "premiums earned"? Why did it say "net losses paid" if it wanted "incurred losses"?

These Missouri statutes were construed by the Missouri Supreme Court and the construction placed upon them will be adopted by this court as the rule is universal that the Supreme Court of the United States will accept

the construction placed upon a state statute by the highest court of that state. In holding that it was the duty of the Missouri Supreme Court to construe the Missouri Rating Act and that the construction placed on same would be adopted by this court, Mr. Justice Sutherland in the recent case of *Supreme Lodge, Knights of Pythias*, v. *Meyer*, 265 U. S. l. c. 32, said:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein. See, for example, *Leffingwell* v. *Warren*, 2 Black, 599, 603; *Green* v. *Lessee of Neal*, 6 Pet. 291, 297-300. And we follow the state construction even though it may not agree with our own opinion. *Supervisors* v. *United States*, 18 Wall., 71, 82; *Shelby* v. *Guy*, 11 Wheat. 361, 367; *Tioga R. R.* v. *Blossburg & Corning R. R.*, 20 Wall. 137, 143."

In the Missouri Supreme Court the fire insurance companies contended that under the Missouri Rating Act profit or loss could be determined upon the basis of premiums earned, losses and expenses incurred. The State contended that under such Act the proper method was premiums received, losses and expenses paid. It was purely a matter of construction of the Missouri Rating Act and in holding that this was a matter for the court to determine, Mr. Justice Van Devanter in *Des Moines National Bank* v. *Fairweather, et al*, 263 U. S. l. c. 105, said:

> "We are asked to go into the proper construction of the state statute and its validity under the

state constitution. But these are questions of local law, the decision of which by the Supreme Court of the State is controlling. *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660, 664; *Merchants' and Manufacturers' National Bank* v. *Pennsylvania*, 167 U. S. 461; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Price* v. *Illinois*, 238 U. S. 446, 451."

The evidence in this case shows that the premium earned theory contended for by these fire insurance companies is fundamentally unsound and erroneous in that it excludes from consideration large portions of income and includes all of the expense which will ever attach to the acquisition of such income, amounting to 42 per cent of same and considering, in the matter of incurred losses, a large amount of apparent losses which will never be paid, as for example, recoverable re-insurance, salvage, defeated claims, settled claims, and over-estimates of the actual loss, because incurred losses in themselves are based upon a mere arbitrary calculation of what the loss will actually be and because all losses are paid out of current receipts, no matter when same may have happened; because, further, it is a matter of calculation so fundamentally unsound and economically erroneous that it reflects a complete false result, in that if business is on an ascending scale and is prospering, by this curious methor of calculation, there will apparently be no profits; if the business is declining, by this method of calculation, there will apparently be large profits. By this method, when the companies desire to calculate the earned premiums and take over the premiums received during the five year period under investigation, they add to

that all of the outstanding unearned premiums at the beginning of the period and subtract all of the outstanding unearned premiums at the end of the period, that is, on an ascending scale of business they add the smaller amount and subtract the larger amount.

In the instant case they added at the beginning of the period $9,000,000.00 (R. 2029-2254-2258) and subtracted at the end of the period more than $17,000,000.00 (R. 2029-2255-2258), leaving a difference of more than $8,000,000.00, which they did not consider as income at all, but 42 per cent of that income representing expenses was considered as part of the experience of the five years in arriving at the result of that experience. Curiously enough in arriving at incurred losses and expenses, the companies simply reversed the method and, instead of adding the outstanding incurred losses and expenses at the beginning of the period, they subtracted them, but added the outstanding incurred losses and expenses at the end of the period; so that on an ascending scale of business, a majority amount of expenses and losses are added at the end of the period, but are subtracted at the beginning of the period. So that, in arriving at a rate by the use of this method, the companies resolve every advantage in their own behalf. The unanimous opinion of the Supreme Court of Missouri was that this method of calculation was fundamentally unsound and erroneous and that it was evidently, the invention of ingenious insurance counsel or even more ingenious insurance accountants; that the insurance companies always construed the Missouri Rating Act as now contended for by the state, and on such construction secured at least two in-

creases, and naturally the Supreme Court of Missouri construed the Rating Act to mean premiums received as distinguished from premiums earned, and that this court would not interfere with the construction placed upon this Missouri statute by the highest court of the state is aptly said by Mr. Justice Peckham in quoting from Mr. Justice Harlan's opinion in *Lent* v. *Tillson*, 140 U. S. 316, in the case of *Hibben* v. *Smith*, 191 U. S. l. c. 325:

> "In *Lent* v. *Tillson*, 140 U. S. 316, which was an assessment case, it was stated by Mr. Justice Harlan, in delivering the opinion of the court (p. 333), as follows:
>
> 'Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the City of San Francisco, one of the board of commissioners, was himself the owner of a lot on Dupont street, and, for that reason, was incompetent to act as one of the board of street commissioners • • • In respect to all these and like objections, it is sufficient to say that they do not necessarily involve any question of a Federal nature, and so far as this court is concerned, are concluded by the decision of the Supreme Court of California."

There is no need to pursue this subject further. It was purely a matter of construction of the Missouri statute and the decision by the Missouri Supreme Court is controlling and the petition for certiorari should be denied.

II.

No federal question is involved in this case. The decision rests on independent grounds not involving the federal question and the petition for certiorari should be denied.

No federal question is involved in this case. These fire insurance companies were operating in Missouri under a license from the State Insurance Department. They were authorized to conduct a fire insurance business in the state. They had no property in the state, but simply exchanged contracts of insurance for money. It is true they alleged in their petition for review that the reduction order of 10 per cent would compel them to do business in Missouri at a loss, but no question of confiscation is involved because they have no property in Missouri. The Fourteenth Amendment is not in any sense involved in this case. The mere allegation that the reduction order would compel them to do business at a loss is not sufficient to invoke the protection of this section. The evidence overwhelmingly shows that they were earning an enormous profit in Missouri and that they would continue to earn an enormous profit with the 10 per cent reduction in effect. Suppose a carrier alleges a reduction order if enforced would be confiscatory and thus seeks the protection of the Fourteenth Amendment. Suppose upon the trial the evidence shows with the reduction in effect the carrier would earn an enormous profit. Under such circumstances is the Fourteenth Amendment involved? Such amendment does protect property rights, but no property rights would be involved under such a state of facts. It was not necessary in this case

for the Missouri Supreme Court to pass upon any federal question. No federal question was involved. It was purely a question of fact. That is, whether or not under the reduction order the companies would be compelled to do business at a loss and thus have their property confiscated. The evidence shows that they will make an enormous profit with the reduction order in effect. The decision of the Missouri Supreme Court was on other matters than federal matters and the mere fact that an alleged federal question might be remotely involved is not sufficient for this court to assume jurisdiction and issue its writ of certiorari.

If there is one matter finally and conclusively settled by this court it is that where a state decision rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, this court will not assume jurisdiction. In this case the decision rests on purely independent grounds aside from any federal question, and that this court will not assume jurisdiction was said by Mr. Chief Justice Fuller in *California Powder Works* v. *Davis*, 151 U. S. l. c. 393:

> "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to

maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented. *Eustis* v. *Bolles*, 150 U. S. 361."

This same rule is stated in a different way and is much more favorable to the State of Missouri by Mr. Justice Shiras in *Eustis* v. *Bolles*, 150 U. S. l. c. 366:

> "It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635.
>
> It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.
>
> In *Klinger* v. *Missouri*, 13 Wall. 257, 263, this court, through Mr. Justice Bradley, said: 'The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment

on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' "

In this case a construction of a Missouri statute was involved. There were also involved a great many questions of general law, such as the relevancy of certain testimony, whether the same was material or not. An examination of the opinion of the Supreme Court of Missouri will show that no federal question was involved, but that the decision was upon rules of general jurisprudence and broad enough to sustain the judgment without the raising of any federal question. In holding that in such cases this court will not assume jurisdiction by certiorari or otherwise, Mr. Justice Brown, speaking for this court in the case of *New Orleans* v. *New Orleans Water Works Company*, 142 U. S. 1. c. 84, said:

"In order to sustain the jurisdiction of this court upon the ground that a Federal question is presented, it should appear either that such question was apparent in the record, and that a decision was made thereon, or that, from the facts stated, such question must have arisen, and been necessarily involved in the case. If it appear either that the decision of the state court was made upon

rules of general jurisprudence, or that the case was disposed of upon other grounds, broad enough in themselves to sustain the judgment without considering the Federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach."

We have cited a great many other cases under this point, but as the court is so familiar with this rule we deem it unnecessary to quote from them. The most casual reading of this opinion of the Missouri Supreme Court will show that no federal question was involved, that no federal question was passed on, but that the decision was based on the general law of the land, and such being the case this court should not assume jurisdiction by certiorari.

III.

All questions involved in this case are questions of fact. This court has no jurisdiction to review the decision of the Supreme Court of Missouri on questions of fact.

Outside of the construction of a Missouri statute in this case it was purely a question of fact whether the decision should be in favor of the insurance companies or in favor of the State of Missouri.

The insurance companies claim they took in so much money in Missouri; that they paid out so much money for losses and expenses. The state questioned every one of their figures and held that they had attempted to mislead the state. They were compelled by law to file sworn reports with Missouri each year showing their income and outgo, but when this case came on for trial they

presented an entirely new set of figures much more to their advantage, so that it was purely a question of fact as to which set of figures was correct.

Whether they made profit or loss was purely a question of fact and the Missouri Supreme Court, after considering the testimony of both sides, found in favor of the State of Missouri. The rule is universal that this court will not assume jurisdiction in certiorari where questions of fact are involved. Such being the case, this court should not assume jurisdiction.

Obviously the Missouri decision does not rest upon a federal question and in the celebrated case of *Waters-Pierce Oil Company* v. *Texas*, 212 U. S. l. c. 97, Mr. Justice Day, speaking for this court, held that where questions of fact were involved, as in this case, the finding of the highest court of Texas would be sustained, and in stating the rule which is universal in this court said:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quimby* v. *Boyd*, 128 U. S. 488; *Egan* v. *Hart*, 165

U. S. 188; *Dower* v. *Richards*, 151 U. S. 658; *Thayer* v. *Spratt*, 189 U. S. 346."

In *Smiley* v. *Kansas*, 196 U. S. l. c. 453, the suggestion was made that this court should consider questions of fact and determine for itself what the facts were, but in holding that this court would accept the findings of facts as made by the highest court of the state, Mr. Justice Brewer said:

> "The verdict of the jury settles all questions of fact. In *Missouri, Kansas & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 639, it is said: 'Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 242, 246.' "

To the same effect is the case of *King* v. *West Virginia*, 216 U. S. l. c. 100:

> "The question is not open and we shall discuss it no more. It hardly is necessary to add that on a writ of error we do not deal with the facts, *Behn* v. *Campbell*, 205 U. S. 403, 407, and therefore the decision that most of the tracts in question are not within the boundaries of the Morris grant disposes of King's right here."

IV.

These fire insurance companies have no property in Missouri and the Fourteenth Amendment to the Federal Constitution affords them no protection.

The testimony in this case conclusively shows that these companies have no property in Missouri. They simply undertake to protect the owners of property from loss by fire. It is true they attempted to say their agency plants were of some value, but there was a total failure to show same. Their agents have the good-will of their customers, but the insurance companies own no property in Missouri. There is not a syllable of testimony in this transcript that the companies own a dollar's worth of physical property in this state, but they claim to possess good will and it has been definitely decided by this court, as heretofore stated, that good will cannot be considered in determining whether a rate is confiscatory.

Galveston Electric Co. v. City of Galveston, 258 U. S. 388.

In the light of that opinion, there cannot be a federal question in this case because there cannot be confiscation; there cannot be absence of due process nor a denial of equal rights since the companies possess no property in the State of Missouri. An individual cannot conduct a fire insurance business in Missouri. A fire insurance corporation must obtain a permit from the state to do a fire insurance business. The Missouri Rating Act allows the state to regulate fire insurance rates. If a company is dissatisfied with a rate made by the state it is not compelled to transact business in Mis-

souri. It can leave the state without sustaining any loss, it leaves no property behind so there can be no question of confiscation.

This reduction order of 10 per cent was made in October, 1922. Prior thereto in 1920 Missouri allowed these companies a 15 per cent increase. The 10 per cent reduction still leaves them an increase of 5 per cent. They sought a review through the circuit court and the supreme court of the state and the supreme court decided that the reduction order was valid and that they would still earn an enormous profit in Missouri. What protection does the Fourteenth Amendment afford them? They deposit no money with the Insurance Department for the permit issued them and have no property in the state.

Fire insurance is defined in 26 Corpus Juris 17 thus:

> "Fire insurance is a contract of insurance by which the insurer, for a consideration, agrees to indemnify the insured against loss of or damage to property by fire. It is a mercantile contract, having its origin in, and deriving its incidents from, the usages and laws of commercial nations. The contract is one of indemnity only, and from its character as a contract of indemnity the result also follows that it is a personal contract with the insured, which does not run with the insured property unless expressly so stipulated; and in the absence of an assignment of the policy with insurer's consent, the purchaser of the interest of insured in the property acquires no privity with insurer."

This court in the celebrated case of *Paul* v. *Virginia*, 75 U. S. l. c. 183, in a very learned opinion by Mr. Justice Field in 1868 held that insurance was not a matter

of commerce, and in holding that policies of insurance are not within the protection of the commerce clause of the Federal Constitution said:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

In *Northwestern National Life Insurance Company* v. *Riggs*, 203 U. S. 243, an assault was made upon a Missouri statute, stating that false and fraudulent statements in the application should constitute no defense unless such matters actually contributed to the death of the insured, and in holding that such statute was valid and did not deprive an insurance company of any property within the meaning of the Fourteenth Amendment, Mr. Justice Harlan at page 255 said:

> "Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the Fourteenth Amendment. The liberty referred to in that amendment is the liberty of natural, not artificial persons. Nor in any true, constitutional sense does the Missouri statute deprive life insurance companies doing business in that state of a right of property. This is too plain for discussion."

Confiscation within the meaning of the Fourteenth Amendment necessarily implies that one has property in the state which may be confiscated. The water company, telephone company, light company or railroad company dedicates their property to the use of the public. To compel them to give service without just compensation is to deprive them of their property dedicated to the use of the public. Fire insurance companies in Missouri have no property dedicated to the use of the public. They simply issue contracts of insurance. Unlike railroads and other companies dedicating their property to the public they may leave the state at any time they see fit and sustain no loss. Railroads cannot leave because they have vast property interests in the state.

This was evidently in the mind of Mr. Chief Justice Taft when he delivered the opinion of the court in *Merchants Mutual Automobile Liability Insurance Company v. Smart*, 267 U. S. l. c. 130, wherein in stating that insurance companies were not compelled to accept risks or to continue in business if they did not so desire he said:

> "Whatever the especial occasion for the enactment, it is clear that the exercise of the police power

> in passing it was reasonable and can not be said to deprive the Insurance Company of property without due process of law. It is to be remembered that the assumption of liability by the Insurance Company under Section 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so."

The Insurance Companies in their brief before this court, page 19, say: "Petitioners do not attack the constitutionallity of the statute as written, but attack its constitutionality as it is applied in the instant case." This refers to the rating statute in question and is a clear confession on the part of the Insurance Companies that they are attempting to make a federal question out of the construction of a state statute by the state courts of Missouri.

The law is well settled that the construction of a state statute by a state court is final.

> *C. M. & St. P. R. R. Co.* v. *Hackett*, 228 U. S. l. c. 562.

In *Howard* v. *Kentucky*, 220 U. S. 164, the court says:

> "Error of a state court in interpreting and applying the laws of that state furnishes no basis for the claim that there has been a denial of due process of law."

However, if this honorable court should believe that a federal question is involved, then this rate in question, meaning the fire insurance rate in Missouri with a ten per cent reduction should be tested out before being declared confiscatory and void. Counsel for the State of Missouri respectfully call the attention of this court to

the fact that a rate in Missouri is determined upon the experience of the preceding five years; that the period in question in the instant case is from 1917 to 1921 inclusive; that the experience in the instant case is figured practically entirely upon the rate in existence at the beginning of the test period; that in January, 1920, the companies upon their application were granted a 15 per cent increase in rates; that this rate was only put in partial effect; that a very small sum of money, relatively speaking, was collected on account of this increase, due to the fact that the companies had not made their classifications and put same into effect (R. 2059-2060). In 1922 the 10 per cent reduction order in question was made. This reduction order did not reduce the rate in existence during the five year period, but indeed left an increase of 5 per cent over and above the rate in existence during the five year period. Therefore, under the foregoing facts, the new rate, meaning the rate reduced 10 per cent, being a two-thirds reduction of the increase of January, 1920, has not been tested nor tried out.

With reference to a federal question, the companies claim that due process of law has been denied them. Broadly speaking, due process of law means nothing more than the service of notice and a fair and impartial hearing before a proper tribunal. The companies invoked the method of procedure provided by the statutes of Missouri and there is no claim in their brief that due process of law, broadly speaking, was denied them. The same situation is true with reference to the claim that the companies were denied equal protection of the law, the court saying, in *Louisville & N. R. Company* v. *Railroad Commission of Tennessee*, 19 Fed. 679, 694:

> "The general object of the due process and equality clauses is to secure to all citizens in like circumstances an equality of legal rights and to protect minors' and other interests not strong enough to protect themselves against aggression of the majority * * * and to give everyone an equal right to invoke the remedies prescribed by law for the redress of wrongs."

There is no claim that any of these rights involving due process and equal protection of the laws has been denied the companies. Therefore the companies cannot invoke Section 1 of the 14th Amendment unless perhaps confiscation would amount to a denial of due process. As stated before, this is a new and untried rate. Its application is fully discussed in the majority opinion of the Supreme Court of Missouri. That opinion develops that the whole controversy rests upon a construction of the figures supplied by the Insurance Companies themselves. Under those conditions this rate should not be passed upon in this proceeding and this application for certiorari should be denied, to the end that the rate might be given a proper test.

This court said, in the case of *Brush Electric Company* v. *City of Galveston, et al.*, 262 U. S. 1076:

> "The Supreme Court of the United States will not interfere with a decree of the trial court that a bill to enjoin enforcement of rates for public service, alleged to be confiscatory, be dismissed until the effect of the new rate can be tested, where the evidence is conflicting and a conclusion to be drawn therefrom uncertain and speculative."

See also to the same effect *Cedar Rapids Gas Light Co.* v. *City of Cedar Rapids*, 223 U. S. 653.

Again this Honorable Court has said in *City of Louisville* v. *Cumberland Telephone and Telegraph Co.*, 225 U. S. 431:

> "The enforcement of a municipal ordinance fixing telephone rates should not be enjoined as confiscatory before giving such ordinance a trial to show its actual effect, where the evidence *leaves the probable result very close to the dividing line between the yield of a fair rate and confiscation.*"

Again this Honorable Court has said in *Galveston Electric Company* v. *City of Galveston*, 258 U. S. 388:

> "A street railway fare fixed by municipal ordinance under which the net earnings of the street railway system, both in the year ending June 30, 1920, and in the calendar year 1920, were less than 8 per cent of the value of the property used at the public service, whether the value be estimated on the basis of prudent investment or reproduction cost, will not necessarily, in view of abnormal conditions, be confiscatory in the future."

In the light of all the foregoing, counsel for the State of Missouri, submit that this Honorable Court should refuse to take jurisdiction, refuse to issue the writ of certiorari as prayed, and permit a proper test of the rate in question to be made.

V.

The Missouri decision is so clear and convincing on all points decided that we are unable to add anything to it.

We feel confident that this is not such a case as this court should assume jurisdiction of. We did not

intend to discuss this case on its merits. Nearly four thousand pages of testimony have been submitted with this application. To attempt to discuss the merits of this case would require such a large brief that we might violate Rules 24 and 25 of this court. However, petitioners' brief in support of this application is so unfair in singling out isolated portions of the testimony that we are compelled to correct some of their assertions.

The Missouri Supreme Court consists of seven judges. This court is told that this opinion was by four judges. Four judges concurred in a majority opinion; two judges dissented on some grounds and the seventh judge did not sit, having formerly been attorney general. It was not a four-three opinion, as indicated by the brief herein of the insurance companies, but, except as to one minor point, the entire court was with the state. All six judges found against these insurance companies on their method of figuring profit and loss and adopted the state's method. Only on the question of allowing interest earnings on unearned premiums was there any conflict. This is a small item, so it is not unfair to say that the opinion was practically unanimous.

We shall now take up and answer as briefly as possible the argument on the merits of this case as made by petitioners.

THEY SAY—"THE ADOPTION OF THE RECEIVED AND PAID METHOD INSTEAD OF THE EARNED AND INCURRED METHOD OF CALCULATING PETITIONERS' UNDERWRITING PROFIT IS UNREASONABLE, FUNDAMENTALLY ERRONEOUS AND CONFISCATORY."

The entire court found against these insurance companies on this point and the evidence in the record is so overwhelmingly in favor of the state that the matter should be concluded.

Four presidents of the largest fire insurance companies in America testified that the calculation of profit or loss could not be made upon the basis of earned premiums, incurred losses and expenses, as contended for by these insurance companies (R. 408-722-1146-1190-1192-1211-1293).

All the reports filed by these insurance companies with the state were on the basis of premiums received, losses and expenses paid (R. 1198). These insurance companies helped prepare the Rating Act and agreed to the method of premiums received, losses and expenses paid (R. 2300-2305). In 1925 these insurance companies applied for and received an increase using the state's method of premiums received, losses and expenses paid (R. 2834-2839).

In January, 1920, the insurance companies applied for and received an increase of 15 per cent on the state's method of premiums received, losses and expenses paid (R. 2744). The premium earned method, as now contended for by these insurance companies for the first time in Missouri, cannot be used for ratemaking pur-

poses under the Missouri Rating Act (R. 2755-2756). The premium earned method is purely arbitrary and just a guess (R. 495-496-497).

Such method was adopted by these companies for the first time in Missouri upon the filing of this law suit because it works to their advantage and is unfair to the state (R. 502-2034-2035-2037-2038).

To allow these insurance companies profit on this new method of theirs means a return to the stockholders of at least 600 per cent (R. 895). These insurance companies conceded that the earned premium basis is unfair because they say that in using such basis they have never shown more than a profit of 1 per cent.

Much more could be said under this point, but as all of the members of the Supreme Court of Missouri agreed with the state on this point we refer to their opinion.

THEY SAY—"THE APPLICATION OF $2,301,132 INTEREST EARNINGS FROM INVESTMENTS OF UNEARNED PREMIUMS TO A REDUCTION OF RATES FOR UNDERWRITING IS UNREASONABLE AND CONFISCATORY."

The opinion of the Missouri Supreme Court is so clear on this point that we do not feel able to add anything to it. The court reaches the conclusion that all money received from policy holders is money received from the insurance business, whatever it may be called. To this there is no answer and these petitioners have offered no suggestions and do not offer any cases tending in any way to impair the opinion of the Missouri Supreme Court. It might be added that if, under the

Missouri Rating Statute, net premiums received furnish the proper basis for calculation, and there seems to be no doubt of that—and in passing counsel for the state say to this Honorable Court that the premiums calculated in the instant case are not premiums received—that such net premiums received are all part of the underwriting activities of the business. Indeed, as the majority opinion points out, unearned premiums are kept separate in reports of the companies themselves from their other investments, and that there is no actual division of the moneys of the companies into earned premiums and unearned premiums, but all of them are kept together, there being no separation except in a pure bookkeeper fiction. If all of the net premiums received are part of the underwriting experience, upon what theory of reasoning could the accretions upon that sum of money, held as part of the underwriting experience, not follow in character their principal? The very fact that the unearned premiums are retained, as the companies contend, for the purpose of taking care of some possible underwriting losses, brands indelibly upon those moneys the character of underwriting experience and they actually remain in the underwriting department, and if, while so doing, there should be accretions, those accretions follow the character of their principal and are part of the underwriting experience.

Originally the companies claimed (R. 301-302) that it was fair to charge all of their investment expenses of every kind and character in a proportionate part to the State of Missouri but to refuse to consider in rate

making the earnings of their investments. Later on, recognizing the utter indefensibility of such a position, the companies stated that they were segregating expenses as best they could between investment and underwriting expenses, a practical impossibility because of the complete intermingling of all the business of the company, and that as to the rest they were considering one-eighth of one per cent of the mean invested assets as investment expenses and deducting it for the purpose of arriving at their calculations in this case (R. 1285 to 1289). This is a pure arbitrary figure with no proof whatever anywhere in the record that can be cited of its accuracy. As a matter of fact, expenses are being apportioned to the State of Missouri for the investment of capital and surplus and many other banking operations of insurance companies, but the earnings from those sources are not, even under the majority opinion of the Missouri Supreme Court, being considered in arriving at rates. Without doubt, in view of all the foregoing, and in view of the plain wording of the statutes of Missouri requiring the insurance companies to report their earnings upon unearned premiums, those earnings should be considered in arriving at a rate. This is a pure construction of the state statutes as cited, and furnishes no federal question whatever upon which certiorari should issue.

THEY SAY—"THE DEDUCTION FROM PETITIONERS' EXPENSES OF $2,496,715 EXCESS COMMISSIONS PAID TO THEIR ST. LOUIS AGENTS IS UNREASONABLE AND CONFISCATORY."

No evidence was offered by these insurance companies as to why they should pay greater commissions to agents in St. Louis than in Kansas City or other parts of the state. It is true some suggestion was made that agents divide the excess commissions with brokers, but as the Missouri opinion says, "why should the policyholders in Missouri be compelled to pay fire insurance agents in St. Louis these excess commissions simply in order that they might split same with the brokers? No reason has been suggested or can be suggested why this expense should be charged against the State of Missouri, and again we refer to the opinion of the Missouri Supreme Court.

Clearly the construction of the Missouri Statute as to whether or not this expense was a corporate one to be borne by the corporation itself or an operating one to be figured in rate making is to be decided finally by the State Court of Missouri, and the Supreme Court, in its opinion, has decided that this is an expense of such a character that it cannot be charged to the state in arriving at a rate.

THEY SAY—"THE REJECTION OF $628,123 WAR TAX AS AN ITEM OF EXPENSE IS UNREASONABLE AND CONFISCATORY."

The Missouri Supreme Court opinion, in dealing with the federal income tax, disallows same because

never paid by the companies to the government. The reason it was not paid is this: These companies say they reported their business to the government on the basis of premiums earned, losses and expenses incurred, and of course, if they did so they did not show a profit in Missouri and did not pay this sum of money. Having reported to the government that they lost money in Missouri, of course, they would not pay any federal tax on Missouri business. The suggestion about the payment of premium state tax was fully considered by the Missouri Supreme Court and as that law has been repealed and was not in existence at the time the reduction order was made they will not have to pay same in the future, and it will be highly improper to allow them to consider this for the purpose of figuring a rate to be charged the Missouri policyholders in the future. As they will not have to pay this war tax in the future, it should not be charged against future policyholders.

THEY SAY—"THE FIXING OF 8% OF PREMIUMS RECEIVED, OR $6,680,169, AS A REASONABLE PROFIT UPON THE BUSINESS OF THE TEST PERIOD WAS UNREASONABLE AND CONFISCATORY, BECAUSE NO ALLOWANCE WAS MADE FOR PROPER ELEMENTS OF INCOME AND OUTGO OR FOR THE UNEARNED PREMIUM RESERVE."

Under this point petitioners again argue for the earned premium basis as distinguished from the premium received basis. The court allowed them an 8 per cent profit and this is certainly sufficient and the evidence shows in this case that their earnings were so

enormous in Missouri and elsewhere that this 10 per cent reduction would hardly affect them at all. It must be remembered that two years before they secured an increase of 15 per cent so that this reduction only takes off two-thirds of the 15 per cent increase.

THEY SAY—"THE RATING STATUTE AS CONSTRUED AND APPLIED IN THE INSTANT CASE IS UNCONSTITUTIONAL AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT."

Under another point we have shown that no federal question was involved in this case; that no federal question was decided by the court, but that the decision is on broad, general grounds of general jurisprudence. Also that the fourteenth amendment is not in any sense involved.

THEY SAY—"IF ANY SINGLE POINT OF ATTACK UPON THE RATE REDUCTION ORDER IS SUSTAINED, THE ORDER MUST FALL."

Petitioners urged this same point before the Missouri Supreme Court and there is absolutely no merit in it. It is not true that the opinion sustains the order by the narrow margin of $607,040. It is obvious that these insurance companies do not understand or have misrepresented the table submitted by the Missouri Supreme Court. The finding is that these insurance companies made $7,287,209 during this period "with the reduction of 10 per cent in full operation and the increase of 15 per cent in operation as far as it was properly applied at that time." This is quite different from the

statement of petitioners to the effect that the supreme court held that they made a profit of only $8,681,964 without any consideration being given to the 10 per cent reduction. The opinion shows that they made an enormous profit and they have either misconstrued the profit allowed them or misstated it.

The tables as set out in the opinion of the Missouri Supreme Court are exceedingly clear and it must be admitted that this reduction was a proper one and that when in effect these companies will earn more than a reasonable return.

THEY SAY—"IN THE EXERCISE OF A SOUND JUDICIAL DISCRETION, CERTIORARI SHOULD ISSUE."

As we have stated, no federal question was involved in this case; no federal question was decided, and this court, following a long line of cases, cannot assume jurisdiction and issue this writ of certiorari.

Conclusion.

The evidence in this case was all in favor of the State. These insurance companies made an enormous profit in Missouri and will still make an enormous profit with this reduction in effect. They have no property in Missouri and no question of confiscation is involved. During this period these companies have been allowed, contrary to the statute of Missouri, but by stipulation, to charge and retain the full premium without any consideration being given to the reduction of 10 per cent. Having accepted this money and retained same with the

knowledge that they might have to return it, and should not now be heard in argument that certiorari should issue, to say that they would have to return seven millions of dollars. This sum of money has been collected during the years past in excess premiums. Under the law the companies should have at once put into effect the reduced rate. Instead, by stipulation, they were permitted to collect the excess commissions and during this period of years they have enjoyed the fruits and the earnings of some seven millions of dollars which they will not have to repay. They will not be required to do business in Missouri at ruinous rates as claimed by them because, under the evidence, they made large earnings under the old rate in effect during the five year period. By this order they are given a five per cent increase over that rate, which is now fully effective. They received it and went into court for the purpose of retaining it. The Missouri Supreme Court decided against them. It could not have done otherwise.

We respectfuly submit that the application and petition for certiorari should be denied as no federal question is involved and the Missouri Supreme Court's opinion should stand.

Respectfully submitted,

North Todd Gentry,
Attorney General of Missouri,
Floyd E. Jacobs,
John T. Barker,
Attorneys for Respondent.